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PREVENTION OF DISCRIMINATION AGAINST AND
THE PROTECTION OF MINORITIES

Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoplesg

Introduction

1. In resolution 1999/23 (para. 4), the Sub-Commission on the Promotion and Protection of Human Rights decided to entrust Ms. Erika-Irene Daes and Mr. Asbjørn Eide with the preparation of a working paper, without financial implications, on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, for submission to the next sessions of the Working Group on Minorities and the Working Group on Indigenous Populations and to the Sub-Commission at its fifty-second session.

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I. PAPER BY ASBJØRN EIDE

Categories of rights: Some initial observations

2. While this paper deals with rights specific to minorities and indigenous peoples, it is useful to put it in the wider context, recognizing that four sets of rights are relevant:

(a) The general human rights to which everyone is entitled, found in the Universal Declaration on Human Rights and elaborated in subsequent instruments, such as the two International Covenants of 1966. They are all individual rights;

(b) The additional rights specific to persons belonging to national or ethnic, religious or linguistic minorities, found in article 27 of the International Covenant on Civil and Political Rights (ICCPR), the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities ("Minority Declaration"), and in several regional instruments dealing with the rights of persons belonging to minorities. They are formulated as rights of persons and therefore individual rights. States have some duties to minorities as collectivities, however;

(c) The special rights of indigenous peoples and of indigenous individuals, found in the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) and - if and when adopted - in the draft Declaration on the Rights of Indigenous Peoples ("draft indigenous declaration"), adopted by the Working Group on Indigenous Populations (WGIP) in 1993 and now before the Commission on Human Rights. They are mostly rights of groups ("peoples") and therefore collective rights;

(d) The rights of peoples as provided for in common article 1 to the two International Covenants of 1966. These are solely collective rights.

Similarities and differences between the categories of rights

3. Category (a). The general human rights as listed in the Universal Declaration and elaborated in other instruments are individual human rights and can be demanded by everyone, including persons belonging to minorities, indigenous peoples and other peoples. They constitute the foundation of the human rights system. They are based on the two basic principles set out in the Universal Declaration: article 1 (that everyone is born free and equal in dignity and rights) and article 2 (that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status). The individual rights include the right to integrity of the person, freedom of action, due process rights, political rights, and economic, and social and cultural rights. Their major function is to ensure social integration under conditions of equal dignity.

4. Category (b). The rights of persons belonging to minorities build on but add to the foundation rights set out in the Universal Declaration. The Declaration, in article 8.2, expresses

this in the following words: "The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms."

5. The specific rights of persons belonging to national or ethnic, religious or linguistic minorities include the right to enjoy their own culture; to profess and practise their own religion; to use their own language, in private and in public, freely and without interference (ICCPR, art. 27; Minority Declaration, art. 2.1); to participate effectively in cultural, religious, social, economic and public life (Minority Declaration, art. 2.2) and to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live (ibid., art. 2.3); to establish and maintain their own associations (ibid., art. 2.4); to establish and maintain free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties (ibid., art. 2.5). These rights may be exercised by persons belonging to minorities individually as well as in community with other members of their group, without any discrimination, and no disadvantage shall result for any person belonging to a minority as a consequence of the exercise or non-exercise of the rights set forth in the Declaration (ibid., art. 3).

6. Category (c). The rights specific to indigenous peoples and members of indigenous peoples are spelled out in ILO Convention No. 169.[1] More far-reaching rights are proposed in the draft indigenous declaration which was submitted by the Sub-Commission to the Commission on Human Rights in 1994 and is now under consideration there for possible future adoption by the General Assembly.

7. ILO Convention No. 169 and the draft indigenous declaration recognize the foundation of individual human rights. The draft indigenous declaration in article 1 states that indigenous peoples have the right to full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. A corresponding provision can be found in the ILO Convention (art. 3).

8. The specific rights of indigenous peoples contained in the ILO Convention and the draft indigenous declaration are significantly different from those in the Minority Declaration. The difference can probably best be formulated as follows: whereas the Minority Declaration and other instruments concerning persons belonging to minorities aim at ensuring a space for pluralism in togetherness, the instruments concerning indigenous peoples are intended to allow for a high degree of autonomous development. Whereas the Minority Declaration places considerable emphasis on effective participation in the larger society of which the minority is a part (arts. 2.2 and 2.3), the provisions regarding indigenous peoples seek to allocate authority to these peoples so that they can make their own decisions (e.g. Convention No. 169, arts. 7 and 8; draft indigenous declaration, arts. 4, 23 and 31). The right to participation in the larger society is in the draft given a secondary significance and expressed as an optional right. Indigenous peoples have the right to participate fully, *if they so choose*, through procedures determined by them, in devising legislative or administrative measures that may affect them (draft indigenous

declaration, arts. 19 and 20). The underlying assumption must be that participation in the larger society is not necessary when they have full authority of their own to make the relevant decisions.

9. Closely linked to this point is the difference concerning rights to land and natural resources. The Minority Declaration contains no such rights, whereas these are core elements in the ILO Convention (arts. 13-19) and in the draft indigenous declaration (arts. 25-30). Other examples could be mentioned to explain the fundamental difference between the thrust of the rights of persons belonging to minorities and those of indigenous peoples. It is logically connected to the basic point that the minority instruments refer to rights of (individual) persons, whereas those concerning the indigenous refer to rights of peoples.

10. Category (d). What is the relationship between the minority rights and the rights of indigenous peoples, on the one hand, and the rights of peoples to self-determination set out in common article 1 to the International Covenants of 1966, on the other? For the rights of persons belonging to minorities, the answer is simple: the relevant instruments provide no right to group (collective) self-determination. The rights of persons belonging to minorities are individual rights, even if they in most cases can only be enjoyed in community with others. The duties of the State in protecting the identity of minorities may, however, include a duty to accept and encourage conditions for a degree of non-territorial autonomy in regard to religious, linguistic or broader cultural matters. Effective participation by minorities may be facilitated by territorial devolution on democratic, not ethnic, grounds, but the relevant minority instruments do not impose a duty on States to devolve authority on a territorial basis.

11. The question of the rights of indigenous peoples is presently under debate. Are they "peoples" in the sense of article 1 common to the two International Covenants? If they are, they should be entitled freely to determine their political status and freely to pursue their economic, social and cultural development, and for their own ends freely to dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law.

12. The controversy on this issue is still not resolved. While ILO Convention No. 169 uses the term "peoples", it emphasizes in its article 1.3 that the use of that term shall not be construed as having any implications as regards the rights which may attach to the term under international law. Quite clearly, the aim was to prevent "people" being used as an excuse to demand territorial separation. The draft indigenous declaration goes much further: it proposes in its article 3 that indigenous peoples shall have the right of self-determination and by virtue of that right be entitled freely to determine their political status and freely pursue their economic, social and cultural development. This formulation, based on common article 1 of the International Covenants, is one of the most controversial elements in the draft declaration. It has been discussed since the draft was transmitted to the Commission on Human Rights.

13. A long debate took place during the last session of the working group of the Commission set up to consider the draft declaration.[2] Representatives of indigenous groups argued in favour of a full-fledged right to self-determination, though that did not necessarily mean that the right would be used to secede from the States of which they now formed a part. Representatives of

Governments were either opposed to inclusion of the right to self-determination or sought to give it a more limited meaning than was given to that right in the context of decolonization.

14. Two revised understandings of the right to self-determination are under discussion. One concerns so-called "internal" self-determination which essentially refers to the right to effective, democratic governance within States, making it possible for the population as a whole to determine their political status and pursue their development. The other seeks to equate the right to self-determination with the right to some - but unspecified - degree of autonomy within sovereign States.

15. Conceptually and in practice, territorial autonomy should be kept separate from cultural autonomy. Their respective benefits and risks should be discussed. Generally, it is difficult to accept a principle of territorial autonomy based strictly on ethnic criteria, since this ran counter to the basic principles of equality and non-discrimination between individuals on racial or ethnic grounds. There are, on the other hand, strong arguments in favour of forms of cultural autonomy which would make it possible to maintain group identity. What is special for indigenous peoples is that the preservation of cultural autonomy requires a considerable degree of self-management and control over land and other natural resources. This requires some degree of territorial autonomy. The scope of and limits to such autonomy are difficult to specify, however, both in theory and on the ground in specific cases.

16. Whatever position one might take on this subject, which is likely to remain controversial for some time to come, it is clear that the problem of self-determination does not arise in regard to the Minority Declaration, which neither limits nor extends the rights that peoples might have under other parts of international law. The rights under the Declaration may not be construed as permitting any activity contrary to the purposes and principles of the United Nations, including territorial integrity of States [3]

The beneficiaries of the four categories of rights

17. Every individual, including any person belonging to a minority or indigenous group, is entitled to the human rights set out in the Universal Declaration and can claim them in regard to any authority which exercises jurisdiction over her or him. Should minority groups or indigenous peoples have a degree of self-government, their authorities are therefore also obliged to respect and protect universal human rights within their jurisdiction.

18. Special minority rights can be claimed by persons belonging to national or ethnic, linguistic or religious minorities, but also by persons belonging to indigenous peoples. The practice of the Human Rights Committee under article 27 of the ICCPR bears this out.

19. The rights of indigenous peoples, which, under present international law, are found only under ILO Convention No. 169, can only be asserted by persons belonging to indigenous peoples or their representatives. Members of non-indigenous minorities cannot assert the rights contained in that convention.

20. The ILO Convention No. 169 defines the indigenous in article 1 (b) as those "peoples in independent countries who are regarded as indigenous on account of their descent from the

populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".

21. There is still no consensus as to which collectivities are the beneficiaries of the right to self-determination under article 1. There is general agreement that the right applies to the populations of non-self-governing territories as determined by the relevant organs of the United Nations, and to the populations living in occupied territories. It also applies to the population as a whole of sovereign States. Beyond these categories, legal opinion is still divided.

Concluding observations

22. A dual track has emerged in United Nations standard-setting with regard to minorities and indigenous peoples.

23. General human rights have a distinctly integrative function. Minority rights are formulated as the rights of individuals to preserve and develop their separate group identity within the process of integration. Persons belonging to minorities often have several identities and participate actively in the common domain. Indigenous rights, on the other hand, tend to consolidate and strengthen the separateness of these peoples from other groups in society. The underlying assumption is that persons belonging to indigenous peoples have a predominantly indigenous identity and participate less in the common domain.

24. What is normally held to distinguish indigenous peoples from other groups is their prior settlement in the territory in which they live, combined with their maintenance of a separate culture which is closely linked to their particular ways of using land and natural resources.

25. The usefulness of a clear-cut distinction between minorities and indigenous peoples is debatable. The Sub-Commission, including the two authors of this paper, have played a major role in separating the two tracks. The time may have come for the Sub-Commission to review the issue again. One question is whether the distinction has global relevance. It has been argued that the approach to the drafting of *minority rights* has been influenced mainly by European experience and that it therefore is profoundly Eurocentric, whereas the drafting of *indigenous rights* has been influenced mainly by developments in the Americas and in the Pacific region (the "blue water doctrine"[4]), and therefore is America-centric.[5] The distinction is probably much less useful for standard-setting concerning group accommodation in Asia and Africa.

26. Another question is whether all minorities, and all indigenous peoples, should be treated alike, or whether differentiation is required both between minorities and between indigenous groups. For persons of indigenous origin who have migrated to urban areas their separate identity may have to be combined with integration on a basis of equality within the city. Similarly, the needs of minorities who live compactly together and possibly form the majority in a particular region of a country are quite different from the needs of persons belonging to minorities who live dispersed, most of them in cities where persons of many different ethnic origins mingle together.

II. PAPER BY ERICA-IRENE DAES

27. In accepting the task to prepare a working paper with Mr. Eide on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, I am conscious, first of all, of the excellent and very comprehensive paper by Mr. Eide which constitutes Part I of the present working paper and of the work of a number of other legal scholars and competent bodies of the United Nations system that have preceded me and dealt with the subject matter or failed to resolve the complex question of the terms "minorities" and "indigenous" to the satisfaction of Governments and the groups concerned. My experience tells me that there is no simple solution in logic or in law concerning these terms. I do believe, however, that it is possible to simplify the argument over definition by presenting the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, identifying certain basic factors, reviewing a number of important characteristics and eliminating many misconceptions.

28. It might be useful to begin by identifying the factors which, singly or in some combination, have repeatedly been asserted as characteristics of either minorities or indigenous peoples:

(a) Numerical inferiority;

(b) Social isolation, exclusion, or persistent discrimination;

(c) Cultural, linguistic or religious distinctiveness;

(d) Geographical concentration (territoriality);

(e) Aboriginality (i.e., being autochthonous).

29. The term "minority" has sometimes been applied to any group that constitutes less than 50 per cent of the population of a State. It has been assumed that numerical inferiority places the group at risk, thus justifying special measures of protection. This may often be true, as in the example of African-Americans in the United States. However, a numerically small group may also be a dominant elite, as was the case of the Afrikaners during the *apartheid* regime in South Africa. The numerical superiority of indigenous peoples in countries such as Bolivia or Guatemala has likewise been no guarantee of their enjoyment of basic human rights.

30. For these reasons, most previous attempts to define "minorities" and "indigenous peoples" have emphasized their non-dominant status in national society, either as a sufficient criterion, or in conjunction with the criterion of numerical inferiority. This solution poses both methodological and logical problems. The measurement of dominance can be challenging. A group may nominally control the State apparatus yet be subordinate to another group that controls, for example, the lands, finances or military institutions of the country. *De jure* dominance may be de facto subordination. More seriously, applying non-dominance as a key characteristic of minorities or indigenous peoples results in the paradox that a group ceases to be a minority or an indigenous people when it realizes its human rights, or attains social and

political equality. We are faced with a logical dilemma. Either we admit that the goal of equality will never be achieved fully, or we accept terms such as "minority" as purely situational and transitory. No minority or indigenous people has admitted that its legal status exists only at certain times, and in certain situations.

31. Is this merely a problem of language? A group asserts its rights when it feels that its rights are being violated. The problem for the international community is first to ascertain what rights a particular group may legitimately assert, as a matter of law, so that we can then determine whether legitimately claimed rights are being violated as a matter of fact. The question of whether a group is subordinate may be impossible to resolve until we agree on what kind of group it is. For example, if Afrikaners argue that they are entitled to special rights to their lands and autonomy, we must first determine whether they have a legitimate claim to being "indigenous". The fact that they lack any special rights to land cannot be a factor in deciding whether they are indigenous because that would make the exercise logically circular.

32. The existence of subordination is the reason why we need to have international instruments such as the 1992 Minority Declaration.

33. Cultural distinctiveness - whether it is linguistic, religious or ethnic - is widely assumed to be characteristic of both minorities and indigenous peoples, and is generally asserted by both kinds of groups. Indeed, indigenous peoples worldwide contend that they share a special kind of culture that distinguishes all of them from other peoples and cultures. The leaders of minorities and indigenous peoples frequently assert that the enjoyment of their distinctive cultures is the reason they are seeking collective legal recognition and self-determination.

34. It is very challenging to evaluate culture and agree on the extent to which cultures differ. To a greater or lesser extent, all groups and cultures overlap and change over time, particularly in this age of global communications. Does a group gradually lose its rights as its culture changes? Or lose its rights when it exceeds a certain threshold of cultural similarity to other groups?

35. National minorities and "racial" groups pose additional problems of relationship and distinction of their rights. They may be distinguishable from other segments of the national society only with respect to their historical origins, names, or physical appearance. These distinguishing features may expose them to discrimination, but a group's visibility or identifiability may not be associated with the existence of a distinctive group culture. Skin colour prejudice may have nothing to do with the existence of cultural differences, for example. Likewise, a group may struggle against skin colour prejudice without aspiring to the perpetuation of a distinctive culture, but simply because its members wish to escape discrimination. It is probably safest to conclude that while cultural distinctiveness may often be the objective of groups that assert rights as minorities or indigenous peoples, it should not be a threshold criterion for the legitimacy of group claims.

36. In this regard, it should be appreciated that a "minority" can be created either by the actions of the State and its citizens, or by the group itself. Some groups choose to perpetuate a distinct collective identify, while others are satisfied to assimilate into national life but are prevented from doing so by official or unofficial prejudices. Both kinds of situations may result in abuses of human rights, serious violence, and threats to international peace and stability.

37. Aboriginality (i.e. the characteristic of being autochthonous, or the original human inhabitants of a territory) appears to be obvious as a distinguishing characteristic of indigenous peoples. However, it fails to clarify many situations, especially in Asia and Africa, where dominant as well as non-dominant groups within the State can all claim aboriginality. In such situations, previous studies have proposed the use of subordination and cultural distinctiveness as further criteria, distinguishing vulnerable groups from the dominant sectors of society. But this approach fails to distinguish between indigenous peoples and minorities within African and Asian States, unless we are prepared to agree that the distinction is merely one of degree of aboriginality or cultural distinctiveness. In this case problems may arise from applying different approaches to different regions of the world: a qualitative standard in the Americas (aboriginality), and a quantitative standard in Africa and Asia (degree of aboriginality or distinctiveness).

38. The factor of aboriginality fails to clarify the situations of groups which were forcibly dislodged from their ancestral territories, compelling them either to disperse or emigrate across State frontiers. Are emigrant or diaspora groups "indigenous" at their point of origin, and "minorities" everywhere else? Every human lineage can trace roots to a territory in the world, but this does not entitle every group to assert rights as an indigenous people. On the other hand, it would seem unjust for a group to lose its claim to being indigenous at the moment it is forced to abandon its ancestral lands. How long does indigenous status survive a forced removal, and justify a claim to the right to return? Minorities and indigenous peoples share very similar experiences of oppression and displacement, but using the factor of aboriginality accords greater rights to groups that managed to remain physically in possession of their original territories.

39. Indigenous peoples contend that they not only continue to occupy parts of their original territories, but also that they have a special relationship with their lands. This is obviously a claim of cultural distinctiveness, but it may be seen as a refinement of the concept of aboriginality as well. It is a way of saying that living together in relationships is the core aspiration of the group, a *sine qua non* for the enjoyment of their human rights. It may not be the contemporary reality of the group as a result of intervention by State authorities and settlers, but attachment to a homeland is nonetheless definitive of the identity and integrity of the group, socially and culturally. This may suggest a very narrow but precise definition of "indigenous", sufficient to be applied to any situation where the problem is one of distinguishing an indigenous people for the larger class of minorities. However, there is an implication that the distinction may be merely one of degree and not of quality. Many groups that are identified or self-identify as "minorities" regard themselves as connected with a homeland within the State, or another State.

40. Although aboriginality is perhaps the key factor from the perspective of indigenous peoples, it must be borne in mind that many indigenous peoples in the industrialized countries have changed their human-ecological relationships profoundly, and a majority of them are no longer occupying their ancestral territories. Ancestral lands have retained considerable symbolic meaning and political significance for indigenous peoples, even under the circumstances of industrialization and economic integration that prevail in countries such as the United States and in countries where the distinctions between indigenous peoples and minorities with respect to culture and aboriginality have become more matters of degree.

41. The facts remain that indigenous peoples and minorities organize themselves separately and tend to assert different objectives, even in those countries where they appear to differ very little in "objective" characteristics that distinguished them from the rest of the population of the State. At the same time, no definition or list of characteristics can eliminate overlaps between the concepts of minority and indigenous peoples. Cases will continue to arise that defy any simple, clear-cut attempt at classification.

42. In such cases, a purposive approach would seem appropriate. What are the legal consequences for a group being assigned to one or the other category? Which category is most consistent with the goals and aspirations of the group? Which category is consistent with what can realistically be achieved by the group?

43. Classification as a "minority" or as "indigenous" has very different implications in international law. Both categories of groups possess the right to perpetuate their distinctive cultural characteristics and to be free from adverse discrimination on the basis of those cultural characteristics. Both kinds of groups enjoy the right to participate meaningfully in the social, economic and political life of the State as a whole - as groups if they choose, and in any case without adverse discrimination. **In my opinion, the principal legal distinction between the rights of minorities and indigenous peoples in contemporary international law is with respect to internal self-determination: the right of a group to govern itself within a recognized geographical area, without State interference (albeit in some cooperative relationship with State authorities, as in any federal system of national government).**

44. Some minorities today enjoy limited self-government, either de facto or pursuant to national legislation. Only indigenous peoples are currently recognized to possess a right to political identity and self-government as a matter of international law.

45. The exercise of internal self-determination is impractical where the group concerned is highly dispersed, and lacks a principal centre of population and activity. The territorial element is central to the claims of indigenous peoples, and it should be given particular weight precisely because it is so closely related to the capability of groups to exercise the rights which they assert. On the other hand, minority groups may increasingly make claims to autonomy based on the existence of discrete concentrations of their populations in particular regions of States.

46. Categorization of a situation as a "minority" problem or an "indigenous" problem will serve, at best, as a starting point for the international community to recognize the basic legitimacy of a group's desire for political recognition by a State, and promote a process of political engagement between the group and the State concerned.

47. On the basis of the above-mentioned analysis, the most helpful approach we can take is to clarify our understanding of the "ideal types" of each group (that is, "minorities" and "indigenous peoples"), rather than attempt to define a sharp conceptual boundary between the two groups.

48. Bearing the conceptual problem in mind, I should like to suggest that the ideal type of an "indigenous people" is a group that is aboriginal (autochthonous) to the territory where it resides

today and chooses to perpetuate a distinct cultural identity and distinct collective social and political organization within the territory. The ideal type of a "minority" is a group that has experienced exclusion or discrimination by the State or its citizens because of its ethnic, national, racial, religious or linguistic characteristics or ancestry.

49. From a purposive perspective, then, the ideal type of "minority" focuses on the group's experience of discrimination because the intent of existing international standards has been to combat discrimination, against the group as a whole as well as its individual members, and to provide for them the opportunity to integrate themselves freely into national life to the degree they choose. Likewise, the ideal type of "indigenous peoples" focuses on aboriginality, territoriality, and the desire to remain collectively distinct, all elements which are tied logically to the exercise of the right to internal self-determination, self-government, or autonomy.

50. Obviously there will be cases which satisfy both ideal types of "minorities" and "indigenous peoples" and which merit both kinds of protection. Thus, a group can be "indigenous" yet demand not only some degree of self-determination, but also the right to integrate freely into national society for some purposes. A group that is best characterized as a "minority" may nevertheless possess a limited degree of aboriginality and territoriality, and demand some form of autonomy as a reasonable means of protecting itself from discrimination. The inevitability of overlaps does not invalidate the approach that I am proposing or render it useless in practice. On the contrary, in my view, being practical and realistic necessitates an approach that is purposive, and links the characteristics of groups to their aspirations and to the rights they are entitled to and realistically can exercise.

Notes

[1] The Convention is binding only on States that have ratified it; 13 States had done so by May 2000.

[2] The report of the working group is contained in document E/CN.4/2000/84.

[3] Article 8(4) of the Minority Declaration.

[4] The "blue water doctrine" hold that the indigenous are those people beyond Europe who lived in the territory before European colonization and settlement, and who now form a non-dominant and culturally separate group in the territories settled primarily by Europeans and their descendants.

[5] The Sami of northern Scandinavia and the Arctic peoples of the Russian Federation are widely held to be indigenous in spite of the fact that they are not covered by the "blue water doctrine". Norway has ratified ILO Convention No. 169 on the understanding that the Sami are indigenous as defined in article 1 of that Convention.